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12 WAL-MART STORES, INC.

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 BETTY DUKES, PATRICIA SURGESON,
17 CLEO PAGE, CHRISTINE KWAPNOSKI,
18 DEBORAH GUNTER, KAREN
19 WILLIAMSON AND EDITH ARANA, on
20 behalf of themselves and all others similarly
21 situated,

22 Plaintiffs,

23 vs.

24 WAL-MART STORES, INC.,
25 Defendant.

CASE NO. C-01-2252 MJJ

26 **EX PARTE APPLICATION**
27 **REQUESTING CONSIDERATION**
28 **OF ADMISSIONS BY PLAINTIFF**
KWAPNOSKI PERTAINING TO
COURT'S QUESTIONS NO. 2 AND
6 WITH RESPECT TO PENDING
MOTION FOR CLASS
CERTIFICATION

Date: To Be Determined
Time: To Be Determined
Courtroom : No. 11
Judge: Hon. Martin J. Jenkins

Complaint Filed: June 8, 2001
Trial Date: None Set

1 Wal-Mart Stores, Inc., pursuant to Civil Local Rule 7-10(b), requests that
2 the Court consider admissions in a pleading just filed by Named Plaintiff Christine
3 Kwapnoski (through the principal counsel representing her herein) in another lawsuit.
4 The pleading is entitled "Objections of Class Member Christine Kwapnoski to Class
5 Action Settlement (hereinafter "Objection")," a highlighted copy of which is attached as
6 Exhibit A to the accompanying Request for Judicial Notice.

7
8 In moving for class certification in the employment discrimination case
9 before *this* Court, Ms. Kwapnoski claimed that she is similarly situated to salaried,
10 exempt, managerial employees whom she purports to represent. But in the Objections,
11 filed in a wage-hour class action in state court in Santa Barbara, Ms. Kwapnoski contends
12 that she and other bakery managers actually "were performing largely the same non-
13 managerial tasks as hourly employees."

14
15 Before oral argument in this Court, the Court posed a series of written
16 questions to counsel. Ms. Kwapnoski's admissions in the Objections are directly relevant
17 to two of the Court's questions. The Court's Question No. 2, under the heading
18 "Questions for Plaintiffs," was:

19
20 2. Why do plaintiffs not have a class representative who has
21 held a high level in-store management job, and how does the
22 absence of such a class representative affect the Court's Rule
23 23(a) typicality analysis?

24
25 The Court's Question No. 6, under the heading "Questions for Both
26 Parties," was:

1 6. In terms of actual job functions and responsibilities, how
2 similar or distinct are the management positions that
3 Ms. Kwapnoski has held to the higher in-store management
4 positions she has not held?

5
6 Ms. Kwapnoski, through her principal counsel herein, has now filed a
7 pleading confirming that she has worked only for Sam's Club (never for Wal-Mart or a
8 Supercenter), that her highest position is bakery manager, that the wage-hour lawsuit
9 asserts that bakery manager actually is a nonexempt position, that the settlement in the
10 wage-hour lawsuit is inadequate, and that Sam's Club should be subject to a court order
11 requiring either of the following: (1) that Ms. Kwapnoski *not* be classified as salaried
12 exempt; or (2) that Ms. Kwapnoski's duties be altered so that she actually performs
13 managerial tasks.

14
15 The Court's attention is particularly directed to the following pages and
16 lines of Ms. Kwapnoski's objections:

17
18 **Page 2, lines 8-10:** Ms. Kwapnoski has worked only for Sam's Club, and
19 the highest position she attained there is bakery manager.

20
21 **Page 4, lines 6-15:**

22
23 This action alleged that Sam's Club improperly classified
24 ... Bakery Managers and Receiving Managers as exempt
25 employees. . . . Specifically, employees in these job
26 categories were allegedly denied overtime *even though they*
27 *were performing largely the same non-managerial tasks as*
28 *hourly employees.*

1 Despite these allegations, the Settlement Stipulation includes
2 *no* injunctive or prospective relief provisions to ensure that
3 Sam's Club re-classifies these employees. The
4 Settlement Stipulation includes no agreement that Sam's Club
5 will change the duties of these employees to ensure that they
6 are performing managerial tasks [Emphasis added;
7 footnote omitted.]
8

9 The Court is respectfully requested to consider the admissions in the
10 Objections. In this litigation, Ms. Kwapnoski alleges that she is similarly situated to
11 salaried, exempt managerial employees up to and including the managers of \$100 million
12 Supercenters. But in her Objections in the wage/hour litigation, she asserts that persons in
13 her position actually "were performing largely the same non-managerial tasks as hourly
14 employees." Ms. Kwapnoski cannot have it both ways. She cannot be a non-managerial
15 employee for purposes of the wage/hour litigation and a managerial employee for
16 purposes of representing salaried exempt employees herein. Numerous courts have relied
17 on similar inconsistencies in refusing to designate a plaintiff as a class representative.
18 *E.g., Cohen v. Dominic Laiti, Winston Kock, Laventhol & Horwath, & Hedron, Inc.*, 98
19 F.R.D. 581, 583 (E.D.N.Y. 1983) ("We hold that these inconsistencies, standing alone,
20 provide a sufficient basis for denial to the plaintiff of class representative status."); *Kline*
21 *v. Wolf*, 702 F.2d 400, 402-03 (2d Cir. 1982) (inconsistencies created "questionable
22 testimony"; denial of representative status on this basis affirmed); *Panzirer v. Wolf*, 663
23 F.2d 365, 368 (2d Cir. 1981) ("She gave no less than four versions"; "Plaintiff's lack
24 of credibility made her an inadequate class representative"). *See generally Cleveland*
25 *v. Policy Management Systems Corp.*, 526 U.S. 795 (1999) (plaintiff cannot take
26 irreconcilably inconsistent positions on the same issue in different proceedings);
27 *Holtzclaw v. DSC Communications Corp.*, 255 F.3d 254, 259 (5th Cir. 2001) ("*Cleveland*
28

1 teaches that a plaintiff cannot change his story during litigation without a sufficient
2 explanation for his inconsistent assertions.”).

3
4 Respectfully submitted,

5
6 DATED: January 5, 2004

PAUL, HASTINGS, JANOFSKY & WALKER LLP

7
8 By: 

PAUL GROSSMAN

9
10 By: 

NANCY L. ABELL

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12 WAL-MART STORES, INC.
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CERTIFICATE OF SERVICE

I am employed in the City and County of San Francisco, State of California. I am over the age of 18, and not a party to the within action. My business address is Paul, Hastings, Janofsky & Walker LLP, Twenty-Fourth Floor, 55 Second Street, San Francisco, California 94105-3441.

I hereby certify that a true and correct copy of the foregoing document(s) described as: **EX PARTE APPLICATION REQUESTING CONSIDERATION OF ADMISSIONS BY PLAINTIFF KWAPNOSKI PERTAINING TO COURT'S QUESTIONS NO. 2 AND 6 WITH RESPECT TO PENDING MOTION FOR CLASS CERTIFICATION** was served via e-mail and facsimile on this 6th day of January, 2004, upon the following:

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I further certify that a true and correct copy of the foregoing document(s) described as **EX PARTE APPLICATION REQUESTING CONSIDERATION OF ADMISSIONS BY PLAINTIFF KWAPNOSKI PERTAINING TO COURT'S QUESTIONS NO. 2 AND 6 WITH RESPECT TO PENDING MOTION FOR CLASS CERTIFICATION** was served via First Class U.S. Mail on this 6th day of January, 2004, upon the following:

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7 I declare under penalty of perjury under the laws of the United States that
8 the foregoing is true and correct.

9 Executed on January 6, 2004, at San Francisco, California.

10 
11 Helen DeVol